STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

F.O.P. LODGE NO. 1,	**)**	
Charging Party,	**)**	
	)	**ULP No. 04-12-459**
v.	**)**	**Probable Cause**
	)	**Determination**
CITY OF WILMINGTON,	**)**	
Respondent.	**)**	

BACKGROUND

The City of Wilmington ("City") is a public employer within the meaning of §1602(l) of the Police Officers' and Firefighters' Public Employment Relations Act ("POFERA"), 19 Del.C Chapter 16 (1986).

FOP Lodge No. 1, ("FOP") is an employee organization within the meaning of §1602 (g) of the POFERA and the exclusive bargaining representative of police officers in the ranks of Patrol Person, Corporal, Senior Corporal, Sergeant, Master Sergeant, and Lieutenant employed in the Police Department of the City of Wilmington within the meaning of §1602(h) of the POFERA.

This unfair labor practice charge was filed by Charging Party with the Public Employment Relations Board ("PERB") on December 7, 2004. The Charge alleges conduct by the City involving the refusal to pay sick leave to eligible employees in violation of 19 Del.C. §1607(a)(1) and (a)(3), which provide:

1607. Unfair labor practices – Enumerated

> (a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:
> (1) Interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under this chapter.
> (2) Encourage or discourage membership in any employee organization by discrimination in regard to hiring, tenure or other terms and conditions of employment.

On December 21, 2004, the Respondent filed its Answer to the Complaint in which it denied committing the alleged statutory violations. Under New Matter the City alleges that because the police absences on July 13 and 14, 2004 involved an illegal sickout/strike[1] restoring any pay or compensation for the days in question would be contrary to 19 Del.C. §1616(a), (b) and (c), which provide:

> 1616. Strikes prohibited.
> (a) No public employee shall strike while in the performance of the public employee's official duties.
> (b) No public employee shall be entitled to any daily pay, wages, reimbursement of expenses, benefits or any consideration in lieu thereof, for the days in which the public employee engaged in a strike.
> (c) Where a public employee has lost entitlement to any daily pay or other consideration pursuant to subsection (b) of this section, any agreement between such public employee or

[1] 19 Del.C. §1602(m), provides: "Strike" means a public employee's failure, in concerted action with others, to report for duty, or the public employee's wilful absence from the public employee's position, or the public employee's stoppage or deliberate slowing down of work, or the public employee's withholding in whole or in part from the full, faithful and proper performance of the public employee's duties of employment, or the public employee's involvement in a concerted interruption of operations of a public employer for the purpose of inducing, influencing or coercing a change in the conditions of compensation rights, privileges or obligations of public employment; however, nothing shall limit or impair the right of any public employee to lawfully express or communicate a complaint or opinion on any matter related to terms and conditions of employment.

> employee organization bargaining on the public employee's behalf and a public employer which provided for the direct or indirect restoration of such entitlement shall be void as against public policy.

The City argues that the Petitioner has, therefore, failed to state a claim upon which relief can be granted.

Further, by participating in an illegal sickout/strike, Petitioner violated 19 Del.C. § 1616(a) and §1607(b)(2) and (b)(3) which provide:

> (2) Refuse to bargain collectively in good faith with the public employer or its designated representative if the employee organization is an exclusive representative.
>
> (3) Refuse or fail to comply with any provision of this chapter or with rules and regulations established by the Board pursuant to its responsibility to regulate the conduct of collective bargaining under this chapter.

Respondent also alleges that the Petitioner violated the status quo of the collective bargaining agreement which expired on June 30, 2001, specifically §[23.1] and §[23.2], which provide:

> ARTICLE 23
>
> No Strike Clause
>
> Section 23.1 The Lodge agrees that there shall be no strike, picketing, sit down, slow down, willful absence from assigned duty or the abstinence in whole or in part from full, faithful and proper performance of the duties of employment during the life of this Agreement.
>
> Section 23.2 In the event the prohibited activities listed in Section 23.1 of this article do occur, the Lodge's officers and agents will promptly and publicly disavow

> such prohibited activity and order their members to return to work. The Lodge shall notify the Employer within twenty-four (24) hours after the commencement of such prohibited activities listed in Section 23.1, what measures it has taken to comply with the provisions of this article.

The Respondent alleges that where all the facts and occurrences occurred after the expiration of the prior contract on June 30, 2001, and before the signing of the new contract on October 20, 2004, the FOP cannot compel arbitration. Litton v. National Labor Relations Board, 502 U.S. 190 (1991).

On December 21, 2004, the City also filed a Counter Complaint. Count I of the Counter Complaint alleges that in response to the illegal job action, the City was compelled to file for a Temporary Restraining Order [2]resulting in attorney's fees and costs in excess of $25,729.60, overtime expenses and other consequential expenditures.

Count II of the Counter Complaint alleges that on or about May 20, 2004, the Petitioner threatened its members with fines and suspension for anyone accepting voluntary overtime. It was, therefore, necessary to direct fifty-four (54) bargaining unit employees to work during the July 4th City celebration. Of the fifty-four (54) employees so directed thirty-eight called out sick, in violation of §1607(b)(6) of the POFERA, which prohibits a labor organization from conduct that will:

> (6) Hinder or prevent (by threats, intimidation, force or coercion, of any kind) the pursuit of any lawful work or employment by any person, or unreasonably interfere with the entrance to or egress from any place of employment.

[2] On July 15, 2004, the Chancery Court of the State of Delaware issued the requested Temporary Restraining Order.

On December 29, 2004, the Petitioner responded to the Respondent's New Matter denying each of the allegations set forth therein. As to Count I of the Counter Petition the Petitioner contends that simply realleging certain of the allegations contained in the Answer, without greater specificity, constitutes an insufficient designation of what matter was incorporated. Aktiebolaget Stile-Werner v. Stille-Scanlon, Inc., D.C.N.Y., 1 F.R.D. 395; Hadley v. Rinke, D.C.N.Y. 3 F.R.Serv. 8b.12, case 1 (1940); Wolfe v. Charter Forest Behavioral Sys., Inc., D.C.La., 185 F.R.D. 225 (1990).

As to Count II, the Petitioner admitted that the general membership of FOP Lodge No. 1 resolved that its members would not volunteer for certain overtime work and that the Chief of Police directed officers of FOP Lodge No. 1 to report for certain overtime on or about July 4, 2004. Otherwise, Petitioner states it is without knowledge or information sufficient to enable it to respond.

The Petitioner also alleged under New Matter that the subject matter of the Unfair Labor Practice Complaint and the Counter Complaint has been submitted to arbitration under the parties' collective bargaining agreement and the processing of this Charge should be deferred to arbitration for resolution. The Petitioner further contends that the City's Counter Complaint fails to state a claim upon which relief can be granted.

On January 6, 2005, Respondent filed its Answer to the new matter in Charging Party's Answer to Respondent's Counter Complaint. Respondent objects to Charging Party's requested deferral to the contractual arbitration procedure claiming that it would violate 19 Del.C. §1616(c) for Respondent to enter into any agreement, including an agreement to arbitrate, which could result in the awarding of direct or indirect payments to the affected employees for the two days in question.

PROBABLE CAUSE DETERMINATION

1. ULP No. 04-12-459 raises questions of first impression before the Public Employment Relations Board. The pleadings identify and support factual and legal issues sufficient to establish probable cause to believe that the unfair labor practices alleged in the Complaint and the Counter Complaint may have occurred.

2. The responsibility to administer the POFERA is found in §1601 and §1606 of the POFERA. While the PERB has adopted a discretionary deferral policy that policy does not remove from the PERB the authority or responsibility, to adjudicate Charges which allege violation of the statute rather than the interpretation of the parties' collective bargaining agreement. Here, the sick leave provisions of the collective bargaining agreement cannot supercede the mandate of state law. Consequently, Petitioner's request that the matter be deferred to the arbitration procedure set forth in the collective bargaining agreement is denied.

WHEREFORE, an informal conference will be convened for the purposes of discussing the further processing of this charge, including the method by which the factual and legal issues raised will be presented for resolution.

IT IS SO ORDERED

/s/Charles D. Long, Jr.
Charles D. Long, Jr.,
Executive Director

Dated: January 19, 2005